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OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS,

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT BRIEF OF THE UNITED STATES SENATE AND THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE FOR REVERSAL

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JOINT BRIEF OF THE UNITED STATES SENATE AND THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE FOR REVERSAL

INTEREST OF AMICI

Congress enacted the Line Item Veto Act, Pub. L. No. 104–130, 110 Stat. 1200 (1996) (2 U.S.C. §§691 *et seq.*), as an extension of the Impoundment Control Act of 1974, which established procedures for the President and Congress to defer or rescind previously enacted appropriation provisions. Despite its name, the Act does not give the President any authority to veto items in proposed legislation. Rather, the Act enhances the President's authority, through 2004, to rescind deficit-increasing items in enacted laws, subject to Congress's ultimate control. The district court agreed with appellees' contention that this authority transgresses the Constitution's Presentment Clause, art. I, §7, cl. 2, by letting the President repeal laws without action by Congress. Appellants' Appendix ("App. App.") at 21a–22a, 25a–26a. This appearance as amici curiae [1] explains the basis for Congress's conviction that the Act comports with the Constitution's lawmaking

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[1] Title 2 U.S.C. §288e authorizes the Senate to direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." *See* S. Res. 21, 105th Cong. (1997), 143 Cong. Rec. S619 (daily ed. Jan. 22, 1997) (directing Senate appearance in this case). Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. §288*l*(a). The Bipartisan Legal Advisory Group of the House of Representatives, comprising the Speaker and Majority and Minority Leaders and Whips, traditionally represents the interests and views of the House in judicial proceedings. *See* House of Representatives Rule I(11). The parties' written consents to the House Bipartisan Legal Advisory Group's appearance have been filed with the Court.

procedures and the separation of powers that animates those requirements.[2]

SUMMARY OF ARGUMENT

I. The Line Item Veto Act builds upon over two centuries of congressional delegation to the Executive of discretionary control over spending. From the first appropriation laws, which set ceilings on Executive spending, Congress has repeatedly appropriated funds without mandating that they be spent. In addition to delegating spending discretion in individual appropriation measures, Congress has enacted across-the-board legislation authorizing the Executive to transfer, reduce, or withhold appropriations, initially for purposes of economy and management, and more recently in furtherance of Congress's broad fiscal policies. When disputes have arisen over

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[2] Amici express no position on the standing issue raised by appellants. However, amici note their view that this case presents only the question whether, under the Act's judicial review provision, plaintiffs have constitutional standing as individual Members of Congress. Distinct and significant considerations could arise in a case in which either House, or the entire Congress, sought to invoke the courts' jurisdiction to protect its constitutional prerogatives and duties against intrusion by the Executive or a private party. *See, e.g., United States v. Smith*, 286 U.S. 6 (1932) (adjudicating Senate challenge to presidential appointment); *Barnes v. Kline*, 759 F.2d 21, 25–30 (D.C. Cir. 1985) (holding Senate has standing to assert injury from President's use of "pocket veto"), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C.) (enforcing Senate committee subpoena), *emergency motion for stay pending appeal denied*, No. 94–5023, Order (D.C. Cir. Feb. 18, 1994), *application for stay denied*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers). Questions of standing "contain[ ] beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). In a complex area of law that "has not been defined with complete consistency," *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982), the Court should decide only the standing question necessarily presented by this case, as different separation of powers concerns may well predominate when an entire body of Congress is seeking to protect its rights. *See Goldwater v. Carter*, 444 U.S. 996, 997–98, 1001–02 (1979) (Powell, J., concurring in judgment).

whether the Executive could withhold particular funds, as in the impoundment controversy of the 1970s, all three branches have understood that the issue of how much spending discretion the Executive has is a legislative question subject to Congress's determination. Following the 1970s controversy, Congress enacted the Impoundment Control Act, which constrained Executive rescission of appropriated funds. Now, after two decades of struggle with persistent budget deficits, Congress has amended the Impoundment Control Act to enhance the President's authority to rescind spending, through circumscribed discretion to cancel appropriations within five days of their enactment.

II. The cancellation authority granted to the President in the Line Item Veto Act does not alter the lawmaking process or give the President lawmaking power contrary to Article I, for his sole authority remains to execute the laws in fulfillment of Congress's deficit-reduction policy. The Act fully comports with the bicameralism and presentation requirements of Article I, section 7, as both the Act itself and all laws subject to the Act will have been agreed to by both Houses and signed by the President. The President's approval of a measure subject to the Act, in accordance with the Presentment Clause, constitutes the clear line of demarcation separating the President's Article I duties from his Article II duties. Once the President has signed a bill into law, the lawmaking process is complete. At that moment, when a bill subject to the Act becomes a law, all three legislative actors will have agreed to make the measure's spending or revenue items permissive. Thus, Congress's delegation to the President of post-enactment cancellation authority does not implicate the lawmaking procedures of Article I. Any cancellation will occur as an executive action, limited by a duly enacted statute and in conformance with Congress's will. *See INS v. Chadha,* 462 U.S. 919, 953 n.16 (1983).

The constitutionality of the Act's cancellation authority presents only the question whether the discretion vested in the President violates the doctrine against undue dele-

gation. That the authority is delegated in the areas of spending and taxation is immaterial, for delegation of the "taxing power is subject to no [greater] constitutional scrutiny" than are delegations of other powers. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). Nor does the fact that the cancellation authority permits the President in effect to nullify appropriation provisions render the authority nondelegable. This Court has upheld similar authority to alter the force of statutes since 1813. *See Field v. Clark*, 143 U.S. 649, 682–83 (1892) (citing *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 388 (1813)).

The Court should sustain Congress's delegation of cancellation authority to the President because Congress has "'la[id] down by legislative act an intelligible principle,'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))—deficit reduction—to guide the President's discretion. Further, Congress has prescribed specific determinations and assessments the President must make. Congress has also meaningfully constrained the President's discretion by excluding from his cancellation authority two-thirds of the budget and all substantive legal provisions, and by requiring cancellations to be all-or-nothing, within five days after enactment, irreversible, and devoted entirely to deficit reduction. These attributes narrow the President's discretion and are akin to features of previously sustained delegations. In light of Congress's long-recognized ability to appropriate permissively, the Court should uphold the Act's delegation to the President of this carefully limited authority to cancel spending.

ARGUMENT

I. THE LINE ITEM VETO ACT BUILDS ON CONGRESS'S LONGSTANDING PRACTICE OF GIVING SPENDING DISCRETION TO THE EXECUTIVE

Congress's delegation of authority to cancel spending builds upon a long history of delegation of discretionary

control over appropriated funds that traces from the first appropriation laws Congress enacted under the Constitution.

A. Since 1789, Congress Has Given the Executive Discretion Over the Expenditure of Appropriated Funds

The Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. From its initial exercise of the appropriation power, Congress has acted upon its understanding that, while the Appropriations Clause prohibits the expenditure of federal funds in the absence of a congressional appropriation, an appropriation need not compel the expenditure of appropriated funds. Instead, Congress may choose to make an appropriation permissive.

Congress's first appropriation law, funding the original Executive departments, delegated significant discretion not to spend appropriated funds, providing:

> That there be appropriated for the service of the present year . . . [a] sum *not exceeding* two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government [and] a sum *not exceeding* one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war.

Act of Sept. 29, 1789, ch. 23, §1, 1 Stat. 95 (emphasis added). The next year Congress funded much of the government under similarly flexible appropriations "not exceeding" specified amounts, in one case granting the President unbridled discretion "to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government." Act of Mar. 26, 1790, ch. 4, §§ 1, 3, 1 Stat. 104, 105. That Congress intended these laws setting only a ceiling on expenditures to give the Executive discretion to spend less than the sum appropriated is evident by contrasting the "not exceeding" language with a contemporaneous provision in which Congress directed that "payment of the fol-

lowing sums . . . is hereby authorized *and intended to be made.*" *Id.*, § 5, 1 Stat. 105 (emphasis added). By appropriating funds "not exceeding" a fixed amount, early Congresses manifested recognition of their constitutional authority to delegate to the Executive discretion to spend funds within whatever range Congress set by law.

In the third annual appropriation law, in 1791, Congress not only continued to give the Executive discretion by erecting spending ceilings for much of the government, Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190, but also confirmed that it intended the Executive to use that discretion, by validating the Executive's past expenditure of less than the appropriated levels: sums appropriated in the 1791 law were to be drawn in part from "such surpluses as may remain in the treasury, after satisfying the purposes for which appropriations were made, by the [first two appropriation acts]." *Id.*

At the outset of the 19th century, as the Nation's needs rapidly expanded, Congress gave the Executive even greater flexibility over spending. In 1803, Congress appropriated $50,000 for the President to build "not exceeding fifteen gun boats . . . for such purposes as in his opinion the public service may require." Act of Feb. 28, 1803, ch. 11, § 3, 2 Stat. 206. President Jefferson determined that the "favorable and peaceable turn of affairs on the Mississippi" brought about by the Louisiana Purchase and reopening of the Port of New Orleans had mitigated the need for the vessels, and he reserved the funds until the best models were selected the following year. 13 Annals of Cong. 14 (1803); 14 Annals of Cong. 13 (1804). "The same issue of events" on the Mississippi also "effected by happier means" the purpose of a $1.5 million appropriation, which Jefferson accordingly declined to spend. 13 Annals of Cong. 14; *see also* 1 *Messages and Papers of the Presidents* 382–83, 405, 421 (James D. Richardson, ed., 1897) (Jefferson returning other unused funds).

Congress also early began delegating significant spending discretion by authorizing the transfer of funds be-

tween appropriation accounts. In 1793, Treasury Secretary Alexander Hamilton's execution of an appropriation law had prompted debate whether, in James Madison's words, the Executive had inherent constitutional "discretion to be implied in the trust of executing the laws" to "apply the excess of one fund to the aid of a deficient one," or whether such action depended on "special permission of the law" appropriating the funds. 3 Annals of Cong. 938 (1793). In 1809, Congress authorized the President, "if in his opinion necessary for the public service," to transfer appropriations within a department during a congressional recess. Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535, 535–36. In 1820, Congress amended this authorization to give the President discretion to transfer appropriations within the War and Navy Departments at any time. *See* Act of May 1, 1820, ch. 52, § 5, 3 Stat. 567, 568. Congress continued periodically to grant the President discretion to transfer appropriations until 1868,[3] when Congress repealed all transfer authority and provided that "no money appropriated for one purpose shall hereafter be used for any other purpose."[4]

The recognition of Congress's constitutional authority to delegate discretion over spending persisted through the 19th century. In 1896, for example, Congress authorized the Secretary of War to expend "not exceeding fifty thousand dollars, or so much thereof as may be necessary," to improve the Mississippi River channel and bank. Act of June 3, 1896, ch. 314, 29 Stat. 202, 229. Attorney General

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[3] *See* Act of June 30, 1834, ch. 171, 4 Stat. 742; Act of July 2, 1836, ch. 268, § 2, 5 Stat. 77, 78–79; Act of Aug. 26, 1842, ch. 202, § 23, 5 Stat. 523, 533.

[4] Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 35, 36. In the 20th century, Congress again authorized the transfer of discrete appropriations. *See, e.g.*, Act of June 30, 1932, ch. 314, § 317, 47 Stat. 382, 411 (authorizing transfer during year of up to 12% of any appropriation within same department); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009, 3009–88 (1996) (§ 8005) (authorizing transfer under certain conditions of up to $2 billion of Defense Department funds); *id.*, 110 Stat. 3009–262 (§ 306) (authorizing transfer under certain conditions of Education Department funds).

Harmon advised the Secretary "that the permissive form was here used with the deliberate intention of leaving to your judgment the question whether any of the sum named should be expended; and if so, how much." 21 Op. Att'y Gen. 391, 392 (1896). The Attorney General instructed the Secretary "to proceed with the expenditure authorized if, in your judgment, an improvement of that condition may fairly be expected to result. Otherwise you are left at liberty to leave the appropriation unexpended."[5]

B. This Century Congress Has Periodically Given the Executive Enhanced Spending Discretion to Help Achieve Congress's Overall Goals

This century, as the growth of the federal budget and the economy led to increased governmental responsibility for managing the economy through fiscal policy, Congress began extending to the Executive broader spending discretion to achieve Congress's budget goals. The first purpose for which Congress conferred general authority to manage spending was to facilitate adherence to Congress's mandated spending limitations. As early as 1870 Congress had sought to enforce compliance with its appropriation ceilings through the Antideficiency Act, which made it unlawful for the Executive "to expend in any one fiscal year any sum in excess of appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Three decades later, Congress recognized that sound management required giving the Executive the ability to control the pace of spending. Accordingly, in 1905, Congress amended the Antideficiency Act to authorize agencies to apportion their appropriations on a monthly or other regular basis, so as to avoid the need for deficiency appropriations late in the fiscal year. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. This across-the-board

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[5] *Id.*; *see also* 21 Op. Att'y Gen. 414, 415–16 (1896) (same); *compare* 22 Op. Att'y Gen. 295, 297 (1899) (construing another appropriation as mandatory).

measure thus authorized Executive agencies to exercise a measure of control throughout the budget.

Fifteen years later, the first Director of the Bureau of the Budget, acting under the new Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, directed departments to treat appropriations as spending ceilings and to establish "General Reserves" by saving unnecessary expenditures. *See* U.S. Bureau of the Budget, *Circulars*, "First Budget Regulations," Budget Circular No. 4 (July 1, 1921). Each department was to identify "indispensable" portions of appropriations. After presidential review, the remaining amount, or General Reserve, was not available for obligation. *See id.* President Harding affirmed the understanding that Congress intended appropriations as an upper limit on spending and that departments should effect savings by setting aside a "reasonable reserve" from each appropriation.[6] During World War II, President Roosevelt explained his use of "good management and the practice of commonsense economy" to direct agencies to generate reserves where possible, while recognizing that Congress had delegated no authority to withhold funds "to set aside or nullify the expressed will of Congress" or "substitute for item or blanket veto power."[7]

Congress responded to the need for Executive flexibility during the War by selectively delegating enhanced authority to withhold appropriated funds. For example, Congress authorized the Executive to withhold national highway funds if "the War Production Board shall certify that the use of critical material for additional highway construction would impede the conduct of the war." Act of July 13, 1943, ch. 236, §9, 57 Stat. 560, 563. Then-Senator Harry Truman observed,

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[6] *See* Henry P. Seidemann, *The Preparation of the National Budget*, 113 Annals Am. Acad. Pol. & Soc. Sci. 40, 43 (1924) (reporting Harding's remarks).

[7] Letter from President Roosevelt to Senator Russell (Aug. 18, 1942), *reprinted in part in First Supplemental National Defense Appropriation Bill for 1944: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1943).

> When the Congress appropriates funds it gives the executive branch an authority to incur obligations. Certainly none of us hold that we give a mandate to expend the funds appropriated. We expect the funds to be used only where needed, and not in excess of the amount appropriated, to carry out some phase of law.

89 Cong. Rec. 10362 (1943). At the end of the War, then-President Truman followed this principle in declining to spend funds appropriated for veterans hospitals until after veterans had returned, so that the hospitals could be built where veterans had settled.[8]

In 1950 Congress again amended the Antideficiency Act to give express approval to the Executive's discretionary control over spending consistent with Congress's legislated policy objectives. Congress provided: "In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the [appropriation]." Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765–66. Once the Executive determined that particular reserves "will not be required to carry out the purposes of the appropriation," it was to recommend their rescission. *Id.*, 64 Stat. 766.

In proposing this amendment, the House Appropriations Committee had stated that Congress "decides the maximum amounts which must be appropriated for . . . various activities" and that "[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity." H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950). Congress intended to make the Executive responsible "for

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[8] *See Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 84–85 (1971) (testimony of William J. Driver, former Administrator of Veterans' Affairs); *see also* 1945 Pub. Papers 238 (Truman withholding decision on location of VA hospitals).

rendering all necessary service with the smallest amount possible within the ceiling." *Id.* Acting Attorney General Ramsey Clark later called this description "[t]he classic exposition" of a fundamental principle of appropriations law: "an appropriation act in itself does not constitute a mandate to spend." 42 Op. Att'y Gen. 347, 350 (1967).

The 1950 appropriation law also authorized the Executive, for the first time, to control spending to serve Congress's broad fiscal policy goals: Congress directed the Executive to use the Antideficiency Act's new reserve authority to reduce total spending for the year by at least $550 million below appropriated levels, so long as the reductions not "impair[] national defense." Act of Sept. 6, 1950, ch. 896, § 1214, 64 Stat. 768. To accomplish the required reduction, President Truman reserved and recommended the rescission of funds for 150 separate items. *See Proposed Rescissions of Amounts Placed in Reserve*, H.R. Doc. No. 182, 82d Cong., 1st Sess. 3–8 (1951).

As an additional tool for reducing expenditures, on a number of occasions this century Congress has given the Executive express authority to override Congress's spending decisions and rescind appropriations. Congress's first such delegation came through broad authority to reorganize the Executive branch. In 1933, Congress gave the President latitude, subject only to a report-and-wait requirement, to abolish, consolidate, or transfer executive agencies and functions, with savings in appropriations to be "impounded and returned to the Treasury." Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1489, 1517–19. Within months, President Roosevelt canceled more than $25 million of appropriations by terminating and reorganizing agencies. 1933 Pub. Papers 222–25; 77 Cong. Rec. 5707–08 (1933). Over the next fifty years, Presidents exercised similar statutory authority (subject to legislative veto)[9] to create agencies such as the Department of Health, Edu-

[9] *E.g.*, Reorganization Act of 1939, ch. 36, 53 Stat. 561; Reorganization Act of 1945, ch. 582, 59 Stat. 613; Reorganization Act of 1949, ch. 226, 63 Stat. 203; Pub. L. No. 89–554, 80 Stat. 378, 394 (1966); *see* 5 U.S.C. § 905, historical and revision notes.

cation, and Welfare and the Environmental Protection Agency, using other agencies' appropriations.[10]

During the late 1960s, when Vietnam War expenditures and domestic needs combined to create a fiscal crisis, Congress began delegating to the President even greater control over spending, in the form of annual spending ceilings. Beginning with fiscal year 1969, Congress enacted statutory limits requiring the Executive to hold total spending and new obligations below appropriated levels by $6 and $10 billion, respectively. Revenue and Expenditure Control Act of 1968, Pub. L. No. 90–364, §§ 202–203, 82 Stat. 251, 271–72. Excepting only four categories (the Vietnam War, debt service, veterans' and social security benefits), Congress authorized the President unilaterally to reduce or eliminate spending items as he saw fit to achieve the reductions. *Id.* Congress provided that the amounts of obligations the President chose to reserve under this authority "are hereby rescinded." *Id.*, § 203(b), 82 Stat. 272. The President used this discretionary authority to save billions of dollars in expenditures.[11]

C. On Occasion, the Executive Branch Has Sought to Exercise Greater Spending Authority Than Congress Has Granted

Congress's refusal to give the President similar spending discretion beyond 1971 set the stage for conflict over the President's authority to decline to spend appropriated funds. In addressing these conflicts, all three branches manifested their understanding that the issue of how much discretion the Executive has over expenditures is entirely a legislative matter for Congress to determine in exercising its appropriation power.

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[10] *See* Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631–32; Reorg. Plan No. 3 of 1970, *reprinted in* 84 Stat. 2086–89.

[11] *See* 115 Cong. Rec. 21277–78 (1969). Congress gave the President similar authority the two succeeding years. Pub. L. No. 91–47, § 401, 83 Stat. 49, 82–83 (1969); Pub. L. No. 91–305, §§ 401, 501, 84 Stat. 376, 405–07 (1970).

Episodic disputes over Executive non-spending had surfaced from the mid-1800s. In 1861 Senator Stephen Douglas had objected to President Buchanan's failure to implement an appropriation to build a custom-house in Springfield, Illinois, complaining that "a hostile Executive" had "refused to obey the law." Cong. Globe, 36th Cong., 2d Sess. 1177 (1861). President Grant threatened in 1876 to disregard appropriation provisions, declaring in signing a rivers and harbors bill that he would refuse to spend money appropriated "for works of purely private or local interest." 9 *Messages and Papers of the Presidents* 4331. He justified his refusal by asserting that the objectionable appropriations were not obligatory. *Id.*

The issue of presidential authority over appropriations came to a head under President Nixon. In 1969, his Administration considered withholding educational grants on the theory that the President had inherent constitutional authority to refuse to spend appropriated funds. The Justice Department's Office of Legal Counsel, headed by then-Assistant Attorney General William H. Rehnquist, rejected this theory: "[W]e conclude that the President does not have a constitutional right to impound [appropriated] funds notwithstanding a Congressional direction that they be spent."[12] While agreeing with Acting Attorney General Clark "that an appropriation act permits but does not require the executive branch to spend funds," the Office of Legal Counsel opined that "this is basically a rule of construction," subservient to Congress's will with respect to each individual appropriation: Whether the Executive has discretion over a particular spending measure is solely an issue of congressional intent, and the President has whatever discretion Congress has given.[13]

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[12] Memorandum of Ass't Att'y Gen. William H. Rehnquist, Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 279, 282 (1971) (hereinafter "OLC Memo.").

[13] *Id.*

In the years following, Congress determined not to give the President the discretion it had conferred through prior annual ceilings on total government spending. Nevertheless, the Nixon Administration embarked on an ambitious course of spending cuts, impounding funds appropriated for a wide variety of programs, including housing, education, and environmental programs, notwithstanding the Office of Legal Counsel opinion. As a result, in the early 1970s, courts in scores of cases were required to determine whether the Executive had the authority it asserted not to spend appropriated funds.

To resolve these cases, the courts uniformly looked to Congress's intent, upholding Executive refusals to spend if Congress had conferred such discretion, but invalidating impoundments and ordering funds released when Congress had intended the funds to be spent. In *Train v. City of New York*, 420 U.S. 35 (1975), this Court interpreted a statutory mandate that sums authorized for sewage facilities "shall be allotted," *id.* at 42, to require the Executive to release all funds authorized by Congress. In rejecting the Executive's assertion that Congress had legislated "a maximum, but no minimum," *id.* at 43, the Court made no suggestion that, had Congress delegated "limitless power to withhold funds from allotment and obligation," *id.* at 46, this would have been constitutionally improper. Nor did the Court find it necessary to apply the principle of construing delegations "narrowly to avoid constitutional problems." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *see Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). Rather, the Court used straightforward statutory construction to conclude that Congress had intended to confer no such discretion. *Train*, 420 U.S. at 42–49. Lower courts reached like results in scores of cases also without a hint that such delegations presented any issue other than statutory construction, consistently recognizing that the Executive had as much or as little authority to withhold appropriated

funds as Congress had granted.[14] In the one case in which the District of Columbia Circuit found that Congress *had* authorized the Executive to withhold appropriated funds, the court similarly evidenced no concern that such discretion raised a constitutional issue. *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

D. Congress Legislated Firm Controls on Executive Spending Discretion in the Impoundment Control Act

The frequency with which the Nixon Administration asserted discretion to withhold funds that Congress had intended be spent led Congress to enact legislation to ensure that the Executive would withhold only appropriations that Congress had intended to be permissive. Impoundment Control Act of 1974 ("ICA"), Pub. L. No. 93–344, tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681–688). Through the Impoundment Control Act Congress sought to control two forms of impoundments: deferrals and rescissions. Deferrals refer to spending delays over the course of a fiscal year, while rescissions identify determinations permanently to withhold appropriated funds. *Id.*, §§ 1011–1013, 88 Stat. 333–35. Congress authorized Executive deferrals, upon reporting to Congress and subject to legislative veto. *Id.*, § 1013, 88 Stat. 334–35. Congress permitted the President only to propose rescissions, to be effective only upon enactment, using special expedited procedures, of a rescission law. *Id.*, § 1017, 88 Stat. 337–39. Unless Congress affirmatively approved the rescission, the President was obliged to release the funds. *Id.*, § 1012(b), 88 Stat. 334.

After invalidation of the legislative veto, *INS v. Chadha*, 462 U.S. 919 (1983), the Executive began to use deferrals aggressively on the view that severance of the

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[14] *See, e.g., State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1109–14 (8th Cir. 1973); *Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1381–82 (D.D.C. 1973); *Pealo v. Farmers Home Admin.*, 361 F. Supp. 1320, 1323–24 (D.D.C. 1973); *Minnesota v. Weinberger*, 359 F. Supp. 789, 791 (D. Minn. 1973); *Local 2677, A.F.G.E. v. Phillips*, 358 F. Supp. 60, 75–79 (D.D.C. 1973).

legislative veto from the Impoundment Control Act left the President with expanded deferral authority, subject to disapproval only through Congress's enactment of a new law. The District of Columbia Circuit rejected this view and struck the entire deferral mechanism, holding that the legislative veto provision could not be severed from the deferral authority. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). Congress then amended the Impoundment Control Act to narrow the Executive's deferral authority, in light of the loss of control previously provided by the legislative veto, to those purposes permitted by the Antideficiency Act. Pub. L. No. 100–119, § 206, 101 Stat. 754, 785–86 (1987). As amended, the Impoundment Control Act now authorizes deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or as otherwise provided by law, and allows the Executive only to propose rescissions. 2 U.S.C. § 684(b) (1994).

E. For Over a Decade, Congress Has Delegated Particular Authority Over Spending to Achieve Deficit Reduction

Ballooning federal deficits in the 1980s led Congress to fashion further tools to control spending. In 1985, Congress enacted the Gramm-Rudman-Hollings Act, authorizing the President to issue a "sequestration" order canceling, pro rata, appropriations for a broad range of specified programs, as necessary to meet mandated annual deficit targets. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, tit. II, § 252, 99 Stat. 1038, 1072–78. After this Court invalidated the Comptroller General's role in administering sequestration, *Bowsher v. Synar*, 478 U.S. 714 (1986), Congress amended the Act to delegate the sequestration function exclusively to the Executive. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100–119, tit. I, § 102, 101 Stat. 754, 754–75. When the deficit targets proved difficult to achieve, Congress again

amended the Act to replace the fixed targets with prospective annual spending limits and revenue-neutrality requirements, to be enforced through Executive sequestration. Budget Enforcement Act of 1990, Pub. L. No. 101–508, tit. XIII, §§ 13101, 13111, 104 Stat. 1388–573, 1388–574 to 1388–602.

As large deficits persisted, Congress began considering measures to augment the existing rescission and sequestration regimens. One of these proposals, called "expedited rescission," was to amend the Impoundment Control Act to streamline the process for Congress to approve rescissions proposed by the President. *See, e.g.*, H.R. 2164, 102d Cong. (1991). An alternative proposal, termed "enhanced rescission," was to make Executive rescissions automatic in defined circumstances, subject to congressional disapproval. *See, e.g.*, S. 206, 104th Cong. (1995); H.R. 78, 102d Cong. (1991). Other proposals included amending the Constitution to give the President a line-item veto, *see, e.g.*, H.J. Res. 6, 104th Cong. (1995); H.J. Res. 4, 103d Cong. (1993), or adopting a congressional procedure for presenting each spending provision to the President as a separate bill, for approval or veto, *see, e.g.*, S. 137, 104th Cong. (1995); S. 238, 104th Cong. (1995).

Although these latter, more sweeping proposals did not gain a majority, support for amending the Impoundment Control Act grew, until in the Line Item Veto Act of 1996 Congress determined to give the President "enhanced rescission" authority. Having learned from this Court in *Chadha* and *Bowsher* that Congress cannot reserve any role for itself in executing the laws, Congress delegated all authority to implement the Act to the President, by giving the President circumscribed discretion to cancel spending during a five-day period.

II. THE LINE ITEM VETO ACT IS A CONSTITUTIONAL EXERCISE OF THE APPROPRIATION POWER

Congress's delegation to the President of limited authority to cancel the effect of discrete spending and reve-

nue provisions is consistent with the lawmaking requirements of Article I and the constitutional separation of powers, as expressed in the doctrine against undue delegation.

A. The Line Item Veto Act Conforms With Article I

The Line Item Veto Act respects the lawmaking requirements of Article I. "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Chadha,* 462 U.S. at 945. Article I, section 7, prescribes the two fundamental requisites for legislative action: "bicameral passage followed by presentment to the President." *Id.* at 954–55. These requirements "serve essential constitutional functions" and "represent[ ] the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951.

The Line Item Veto Act fully follows this procedure. The Act itself, obviously, was agreed to by both Houses and the President. Further, the Act applies only to laws that have themselves been enacted in compliance with Article I, section 7, for the President's cancellation authority arises only "with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution." ICA § 1021(a) (2 U.S.C. § 691(a)); App. App. at 32a. Thus, the Act does not alter or enlarge the President's "limited and qualified power to nullify proposed legislation by veto," *Chadha,* 462 U.S. at 947, which, as always, must be exercised with regard to an entire law or not at all. Indeed, by restricting the cancellation authority to provisions that the President has "signed into law," Congress has prevented the President from using the Act to supplement the veto power.

Despite the Act's adherence to Article I's "[e]xplicit and unambiguous provisions," *id.* at 945, appellees contend that the Act violates Article I by giving the President unilateral power, following enactment, in effect to repeal

laws.[15] This Court has established that executive authority to alter the force of laws poses no violation under Article I. In *Chadha* the Court considered the similar argument that permitting the Executive to exercise delegated authority, there under the Immigration and Nationality Act, "will sanction 'lawmaking by the Attorney General. * * * Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?'" 462 U.S. at 953 n.16 (quoting petitioner's brief; omission in original). While noting that "some administrative agency action—rulemaking, for example—may resemble 'lawmaking,'" the Court held, "Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." *Id.* "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Id.*

Similarly, any use of the President's cancellation authority under the Line Item Veto Act will occur not as an exercise of legislative power, but in fulfillment of the President's Article II duty to execute the laws. "When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II." *Id.* at 951 (citation omitted). Once the President signs into law a spending or revenue bill subject to the Line Item Veto Act, he has no more lawmaking responsibilities regarding that legislation. The legislative process is complete, for "a bill when so signed becomes from that moment a law." *La*

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[15] The short title of the "Line Item Veto Act" provides no support for this argument. While "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991), titles and headings do not control over statutory text and "cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 529 (1947).

Abra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899).

From that moment, the President has an Article II duty to execute both the law subject to the Act and the Act itself. The constitutional value underlying the Presentment Clause, that all participants in the lawmaking process agree to precisely the same statutory text, has been achieved: The President's executive authority "cannot reach beyond the limits of the [Line Item Veto Act] that created it—a statute duly enacted," *Chadha*, 462 U.S. at 953 n.16, to which all lawmaking participants agreed. When Congress presents, and the President approves, a bill covered by the Act, all three actors will also have agreed that each spending and revenue item in the bill is to be subject to executive cancellation, within the limits of the Act. Therefore, the President's post-enactment exercise of authority to cancel these items does not implicate the "finely wrought" procedure of Article I. *Cf. Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989) (Article I's Origination Clause "implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted"). [16]

[16] The Act's precise operation reinforces the conclusion that it does not violate Article I, as the manner in which the President exercises the cancellation authority differentiates this delegation from lawmaking. Under the Presentment Clause, if the President does not approve a bill, "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. In contrast, under the Line Item Veto Act, the President sends both Houses a "special message," which is printed not in a congressional Journal but in the Federal Register, where administrative actions are recorded. ICA § 1022(c)(2) (2 U.S.C. § 691a(c)(2)); App. App. at 36a. If either House wishes to disapprove one or more presidential cancellations, it does so not by the originating House's reconsidering the original bill disapproved by the President, as required when overriding a presidential veto, but by considering a fresh bill, in full compliance with Article I, section 7. ICA § 1025 (2 U.S.C. § 691d); App. App. at 39a–47a.

Nor does the requirement that the President exercise his cancellation authority within five days of signing the underlying spending or revenue bill, ICA § 1021(a)(B) (2 U.S.C. § 691(a)(B)); App. App. at 33a, alter this conclusion or suggest that Congress was seeking to enhance the President's veto power. In fact, the five-day limit serves a different and worthy end. Because spending cancellations are limited to total rescission, any potential of a cancellation's occurring after the beginning of a fiscal year would render agencies legally unable to obligate any appropriated funds at the beginning of the year. Otherwise, if any of their spending items came to be canceled, agencies would have already spent some portion of the appropriated, but now rescinded, funds, thereby violating the Antideficiency Act. Moreover, any presidential cancellation will necessarily introduce a period of uncertainty whether Congress will invoke the procedures under the Act to disapprove any of the cancellations. In that interval, agencies whose appropriations are affected by cancellations, along with their employees, beneficiaries, and contractors, and, in the case of revenue provisions, affected taxpayers, will be burdened by that uncertainty. To avoid "unnecessarily prolong[ing] the process," H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 22 (1996), while still giving the President adequate time to make the Act's required determinations, Congress prudently limited cancellation to the five days after enactment.

B. The Line Item Veto Act Assigns Delegable Responsibility to the President

The constitutional principle that ensures that a delegation to the Executive respects the separation of powers is not Article I, but the doctrine against undue delegation. As the Court explained in *Chadha,* after rejecting the claim that the Executive was performing legislative functions in violation of Article I, "[t]he constitutionality of the Attorney General's execution of the authority delegated to him by [statute] involves only a question of delegation doctrine." 462 U.S. at 953 n.16.

That the Line Item Veto Act delegates authority over taxation and spending does not alter the applicability of the delegation doctrine. In *Mid-America Pipeline,* the Court noted the long constitutional pedigree of delegations of taxing authority, 490 U.S. at 221–22 (citing *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394 (1928), and *Field v. Clark,* 143 U.S. 649, 683–89 (1892)), and affirmed "that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Id.* at 223. Spending authority is equally subject to delegation. This Court has never held "*any* legislative power, much less that over appropriations, to be nondelegable due to its 'core function' status," and "[n]o constitutional provision distinguishes between 'core' and 'non-core' legislative functions." *Synar v. United States,* 626 F. Supp. 1374, 1385 (D.D.C.) (three-judge court) (per curiam), *aff'd on other grounds sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986); *see Loving v. United States,* 116 S. Ct. 1737, 1748 (1996).

The only constitutional restriction unique to Congress's "power of the purse" is the Appropriations Clause, art. I, § 9, cl. 7, which "'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond,* 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 321 (1937)). Because the Clause "was intended as a restriction upon the disbursing authority of the Executive department," it "is without significance" when Congress has legislated spending discretion. *Cincinnati Soap,* 301 U.S. at 321; *accord* Joseph Story, 2 *Commentaries on the Constitution of the United States* § 922 (Fred B. Rothman & Co. 1991) (1833) ("clause is a limitation, not upon the powers of congress, but upon the acts of the executive"). The Court accordingly has recognized Congress's power to appropriate funds without specifying "the particular uses to which the appropriated money is to be put":

> That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitutionality of this delegation of authority has never been seriously questioned. [17]

The Line Item Veto Act fully complies with the Appropriations Clause, because Congress continues to appropriate every penny available for spending. The President has discretion only to *decline* to spend funds that Congress *has* appropriated, not to *spend* funds that Congress has *declined* to appropriate.

This delegation of authority in the Line Item Veto Act not to spend appropriated funds is not novel. As described in Point I, Congress has delegated discretion to the Executive to decline to spend appropriated funds since its first appropriations under the Constitution. The Justice Department has concurred that "Congress could provide in its appropriation that the money need not be spent. Or it could enact an appropriation, and then provide in contemporaneous or subsequent legislation that the money need not be spent. . . ." OLC Memo., *supra* n.12, at 282. In construing the appropriation power:

> A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to

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[17] *Cincinnati Soap*, 301 U.S. at 321–22. Recognition of Congress's authority to give the Executive discretion through lump-sum appropriations traces from the earliest period under the Constitution, *see* 3 Annals of Cong. 889–90 (1793), to the present, *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). For example, in 1937 Congress appropriated $1.5 billion (in addition to unexpended prior balances), roughly one-fifth of the entire federal budget at the time, "to be used in the discretion . . . of the President" for a variety of domestic projects. Emergency Relief Appropriation Act of 1937, ch. 401, tit. I, § 1, 50 Stat. 352, 353.

> be found in the origin and history of the power involved, or in its nature, or in both combined.

Cincinnati Soap, 301 U.S. at 315 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936)).

Despite this long accepted history of permissive appropriations, the district court held that Congress had not "conferred a delegable power" in the Line Item Veto Act, but had "ceded basic legislative authority." App. App. at 24a. The court found that "[c]ancellation under the Act is simply not the same thing as impoundment, or any other suspension of a statutory provision," but "is equivalent to repeal." App. App. at 24a–25a. "Never before," according to the district court, has a congressional delegation "gone so far as to transfer the function of repealing a provision of statutory law." App. App. at 25a.

Contrary to the district court's understanding, Congress has long authorized Executive action altering the force of enacted laws, including taxing and spending laws. This Court's approval of such delegations dates at least to 1813, when the Court upheld the President's exercise of delegated authority to "revive[]" a law restricting foreign commerce, which by its terms had expired, so that it would again "have full force and effect." *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 384, 388 (1813).

Describing the *Brig Aurora* decision for the Court in 1892, Justice Harlan noted that, faced with a claim "that Congress could not transfer legislative power to the President," the Court had "deci[ded] that it was competent for Congress to make the revival of an act depend upon the proclamation of the President." *Field v. Clark*, 143 U.S. at 682-83. Justice Harlan traced Congress's delegation of authority to trigger statutory repeals of tax provisions to 1815, when Congress authorized repeal of laws imposing import duties, "[s]uch repeal to take effect in favour of any foreign nation, whenever the President" determines that that nation's duties have been abolished. Act of Mar. 3, 1815, ch. 77, 3 Stat. 224, *cited in Field v. Clark*, 143 U.S. at 685. As Justice Harlan observed, President Mon-

roe used this authority to issue several proclamations, which were printed in the United States Statutes at Large, declaring that those statutory provisions "are repealed" with respect to imports of particular origin. 3 Stat. app. 1, procl. 3–7 (1818–21), *cited in* 143 U.S. at 686.

Justice Harlan also cited a law dating from 1830 providing that Acts of Congress imposing duties on foreign vessels "shall be repealed: *Provided,* That the President" found that the foreign nation's duties had been abolished. Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425, *cited in* 143 U.S. at 687. These legislative precedents giving the President authority to alter the force and effect of tax laws, "from the organization of the government to the present time," are "entitled to great weight." 143 U.S. at 683.

Congress has given the President similar authority to nullify spending provisions. In the 1960s Congress authorized the President to reduce federal spending several billion dollars below appropriated levels through rescission. *See supra* p. 12. Further, the Gramm-Rudman-Hollings Act authorized the President "permanently [to] cancel[]" a portion of all covered appropriations. Pub. L. No. 99–177, § 252(a)(4), 99 Stat. 1074; *see supra* p. 16. In *Synar v. United States,* the three-judge district court "disagree[d]" with the plaintiffs' claim that the delegation was *"per se* invalid because it allows administrators to 'nullify' or 'override' laws":

> The Supreme Court previously has upheld delegations which permit officials to determine when, if ever, a law should take effect. . . . In such cases, the Court classifies Congress' action as legislating in contingency. . . . Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.

626 F. Supp. at 1387.

Nor are statutory delegations to override provisions of law unique to taxation and spending. In the Rules Enabling Acts, for example, Congress delegated to this Court authority to promulgate rules of practice and procedure

for civil proceedings (and formerly for criminal proceedings) in the lower courts and provided that "[a]ll laws in conflict with such rules shall be of no further force or effect." 28 U.S.C. §2072(b) (1994) (civil); 18 U.S.C. §3771 (1982) (repealed) (criminal); *see Sibbach v. Wilson & Co.*, 312 U.S. 1, 7–10 (1941); *Davis v. United States*, 411 U.S. 233, 241 (1973) ("force of §3771" is that "prior inconsistent statute [is] deemed to have been repealed").

As in each of these prior cases, Executive action pursuant to the Line Item Veto Act fulfills, rather than nullifies, Congress's will. Because Congress has expressly legislated that each spending provision enacted over the life of the Act (unless exempted from the Act) be permissive and subject to cancellation within the limits of the Act, a presidential decision not to spend a permissive appropriation in accord with this delegated statutory authority simply does not nullify Congress's legislated will.

C. The Line Item Veto Act Comports With the Doctrine Against Undue Delegation

The Line Item Veto Act is a constitutional delegation that serves the separation of powers through "measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 116 S. Ct. at 1751. Congress's delegation is "'constitutionally sufficient,"' as Congress has "'clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Based upon its judgment about the serious economic threat that persistent budget deficits pose to the Nation, Congress has determined to make all spending and tax provisions covered by the Act permissive for five days from their enactment. In establishing deficit reduction as its paramount objective, Congress has fulfilled "[t]he essentials of the legislative function," *Yakus v. United States*, 321 U.S. 414, 424 (1944), by "'lay[ing] down by legislative act an intelligible principle'" to guide the President's discretion.

Mistretta, 488 U.S. at 272 (quoting *J.W. Hampton*, 276 U.S. at 409).

The determinations, assessments, estimates, and considerations that Congress directed be part of the President's cancellation decisions under the Act provide a robust context guiding his exercise of discretion. To cancel spending or tax benefits, the President must determine, and report to Congress, that the cancellation will reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest. ICA § 1021(a) (2 U.S.C. § 691(a)); App. App. at 33a. The President's cancellation message must provide "supporting material," explain "the reasons for the cancellation," estimate the "fiscal, economic, and budgetary effect," describe "all facts, circumstances and considerations relating to or bearing upon the cancellation," estimate the effect on the "objects, purposes and programs" affected, and identify "the specific States and congressional districts, if any, affected." ICA § 1022(b) (2 U.S.C. § 691a(b)); App. App. at 34a–35a. The President must "consider the legislative history, construction, and purposes of the law" subject to cancellation and "any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information." ICA § 1021(b) (2 U.S.C. § 691(b)); App. App. at 33a.

Key statutory features further confine the President's discretion. The Act constrains the President's cancellation authority to the five days after a measure is enacted, rather than throughout the year. The fact that the cancellation authority is one-time-only also limits the President's discretion, as the President may not cancel funding, only to restore it later. Significantly, the President's cancellation authority is limited to total rescission. The President is thus put to the difficult choice of canceling a spending or tax item entirely or not at all. This "all or nothing" requirement, H.R. Conf. Rep. No. 104–491, at 32, 33, gives the President far less discretion than a general grant of authority to reduce expenditures to any level he sees fit.

Further, Congress made a number of controlling legislative judgments. Congress exempted two-thirds of the budget from the reach of presidential discretion by excluding all current levels of entitlement programs from cancellation. ICA §§ 1021(a)(2), 1026(5), (8) (2 U.S.C. §§ 691(a)(2), 691e(5), (8)); App. App. at 32a, 49a, 51a. Congress also limited the President to cancellation of appropriation dollar amounts, not substantive provisions. *See* ICA § 1026(4)(A) (2 U.S.C. § 691e(4)(A)); App. App. at 48a. By barring cancellation of "fencing language" or other substantive provisions, Congress ensured "that the President cannot use this authority to modify or alter any aspect of the underlying law." H.R. Conf. Rep. No. 104–491, at 20. Finally, to ensure that the authority can be used to advance only its legislative purpose of deficit reduction, Congress enacted an intricate "lockbox" mechanism, ICA § 1024 (2 U.S.C. § 691c); App. App. at 37a–39a,

> to maintain a system of checks and balances in the President's use of the cancellation authority. Any credit for money not spent, or for revenue foregone, is dedicated to deficit reduction . . . . This ensures that the President does not simply cancel . . . in order to increase spending in other areas.[18]

Notwithstanding the substantial legislative judgments and standards embodied in the Act, appellees have pointed to several attributes of the Act to seek to differentiate it from prior delegations. They have noted that the cancellation authority may be exercised immediately, without any intervening changes in circumstances; that, once exercised, it is irreversible; that its exercise is not mandatory; and that the President may use the authority to im-

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[18] H.R. Conf. Rep. No. 104–491, at 20–21. In addition, Congress retains ultimate control over all appropriation and revenue decisions. Because the Act applies only to laws enacted after January 1, 1997, and sunsets on December 31, 2004, 2 U.S.C. § 691 note, App. App. at 58a–59a, with each spending or tax measure enacted over the next eight years, Congress retains the power to make a fresh decision whether or not to make that measure subject to the Act. Each time Congress makes the legislative judgment to let the Act apply, it chooses to make the individual items in that law permissive.

plement his policy choices. This Court's substantial delegation jurisprudence identifies none of these features as injurious to the constitutional legitimacy of a delegation.

The Line Item Veto Act is not the first delegation with these attributes. With regard to appellees' assertion that prior delegations depended upon the passage of a significant interval before their use, during which changes in circumstances necessitating administrative action might occur, one of the most important delegations of contemporary times, the power conferred on President Nixon to impose wage-price controls, depended on neither an interval of time nor a change in circumstances. A three-judge district court in the District of Columbia upheld Congress's delegation of discretion to impose wage-price controls, despite the fact that the delegated authority became effective immediately upon enactment, was based on already-prevailing economic conditions, was to expire in six months, and was extended for periods of as short as two months, to ensure that Congress could keep "close control." *See Amalgamated Meat Cutters v. Connally,* 337 F. Supp. 737, 754 & n.30 (D.D.C. 1971) (three-judge court), *cited with approval in Eastlake v. Forest City Enterprises,* 426 U.S. 668, 675 (1976).

Nor is the irreversible nature of a cancellation under the Act unique. Each of the statutes authorizing the Executive to nullify or repeal tax or spending provisions cited in Point IIB, *see supra* pp. 24–25, from the 1815 law authorizing President Monroe to repeal import duties relied upon by Justice Harlan in *Field v. Clark,* 143 U.S. at 685, to the Gramm-Rudman-Hollings sequestration authority upheld by the three-judge district court in *Synar,* 626 F. Supp. at 1377, delegated similarly irreversible or permanent authority. Moreover, as noted above, that cancellation authority is irreversible operates as a limit, not an expansion, on the delegation.

Finally, that the President has discretion whether to exercise cancellation authority, and that he may use that authority to further policy goals of his Administration, do not distinguish the Line Item Veto Act from prior delega-

tions, nor suggest any constitutional defect. To note just one example, the sweeping authority upheld in *Amalgamated Meat Cutters* "'to issue such orders and regulations as [the President] may deem appropriate to stabilize prices, rents, wages and salaries'"[19] neither compelled the President to impose wage or price controls nor precluded the President from using the authority to further economic goals he supported.

As the Court has recently reaffirmed, "'Congress is not confined to that method of executing its policy which involves the least possible delegation,'" *Mistretta,* 488 U.S. at 379 (quoting *Yakus,* 321 U.S. at 425–26), and it is no indictment of a law like the Line Item Veto Act that Congress has delegated "authority that it could exercise itself," *Loving,* 116 S. Ct. at 1744 (citing *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42 (1825)). The Court should uphold the delegation of Executive authority in the Line Item Veto Act, because the Act meets the standards this Court applies to safeguard the separation of powers.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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[19] 337 F. Supp. at 745 (quoting Economic Stabilization Act of 1970, Pub. L. No. 91–379, tit. II, § 202, 84 Stat. 799, 799–800).